John Du Wors, State Bar No. 233913
john@newmanlaw.com
NEWMAN DU WORS LLP
2101 Fourth Avenue, Suite 1500
Seattle, WA 98121
Telephone: (206) 274-2800
Facsimile: (206) 274-2801

Attorneys for Plaintiff
ConsumerTrack, Inc.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CONSUMERTRACK, INC., a California corporation, Plaintiff, v. BLUE OCEAN ADS, LLC d/b/a BLUE C ADS, a Florida limited liability company; AD PARTNERS, LLC, a Nevada limited liability company; OFFER CONVERSION, LLC, a Puerto Rico limited liability company; PROGREXION HOLDING, INC., a Delaware corporation; LEADVISION MEDIA, LLC d/b/a REVENUEADS AFFILIATE NETWORK, an Oklahoma limited liability company; and ZAPLABS LLC, a Delaware limited liability company, Defendants.	Case No. 2:17-cv-02404 **FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND BREACH OF CONTRACT**

Plaintiff ConsumerTrack, Inc. ("ConsumerTrack") brings this complaint against Defendants Blue Ocean Ads, LLC d/b/a Blue C Ads ("Blue C Ads"), Ad Partners, LLC ("Ad Partners"), Offer Conversion, LLC ("Offer Conversion"), Progrexion Holding, Inc. ("Progrexion"), LeadVision Media, LLC d/b/a

RevenueAds Affiliate Network ("LeadVision"), and ZapLabs LLC, f/k/a ZipRealty, Inc. ("ZapLabs") upon personal information as to Plaintiff's own activities and upon information and belief as to the activities of others, as follows:

INTRODUCTION

1. Plaintiff ConsumerTrack engages in online marketing using commercial email.

2. On January 20, 2017, ConsumerTrack was sued by Utah-based internet service provider, XMission, L.C., for violations of the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 *et seq*., related to emails allegedly sent by ConsumerTrack's affiliates (the "XMission Suit"). ConsumerTrack denies the allegations of liability related to the XMission Suit, but nonetheless is incurring fees and expenses related to the XMission Suit and is exposed to potential liability from the affiliate emails.

3. Each affiliate named herein as a Defendant owes ConsumerTrack an indemnity obligation with respect to the XMission Suit and allegations therein, including but not limited to indemnity for ConsumerTrack's defense costs and potential damages and other remedies related to the XMission Suit and XMission's allegations.

4. ConsumerTrack notified each Defendant of its indemnity obligations. Two Defendants responded, indicating that they would not indemnify ConsumerTrack. The remaining four Defendants did not respond at all.

5. ConsumerTrack now brings suit against each Defendant seeking declaratory relief and damages related to their failure to indemnify ConsumerTrack against its damages, losses, and costs associated with the XMission Suit and XMission's allegations.

PARTIES

6. Plaintiff ConsumerTrack, Inc. is a California corporation with its principal place of business in California.

7. Defendant Blue Ocean Ads, LLC is a Florida limited liability company.

On information and belief, Blue Ocean Ads, LLC is a citizen of Florida for purposes of diversity jurisdiction because its known members are citizens of Florida and no known members are citizens of California.

8. Defendant Ad Partners, LLC is a Nevada limited liability company. On information and belief, Ad Partners, LLC is a citizen of Nevada for purposes of diversity jurisdiction because its known members are citizens of Nevada and no known members are citizens of California.

9. Defendant Offer Conversion, LLC is a Puerto Rico limited liability company. On information and belief, Offer Conversion, LLC is a Puerto Rican citizen for purposes of diversity jurisdiction because its known members are citizens of Puerto Rico and no known members are citizens of California.

10. Defendant Progrexion Holding, Inc. is a Delaware corporation with its principal place of business in North Salt Lake, Utah and is therefore a citizen of both Delaware and Utah for purposes of diversity jurisdiction.

11. Defendant LeadVision Media, LLC is an Oklahoma limited liability company. On information and belief, LeadVision Media, LLC is a citizen of Oklahoma for purposes of diversity jurisdiction because its known members are citizens of Oklahoma and no known members are citizens of California.

12. Defendant ZapLabs LLC is a Delaware limited liability company. On information and belief, ZapLabs is a citizen of Delaware for purposes of diversity jurisdiction because its known members are citizens of Delaware and no known members are citizens of California.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action under 28 U.S.C. § 1332(a) because the matter in controversy for each Defendant exceeds the sum or value of $75,000 and is between citizens of different States.

14. XMission alleges—and ConsumerTrack denies—that it is entitled to more than $20,000,000.00 in damages based on the approximately 33,000 emails it

included in the XMission Suit. The matter in controversy exceeds the sum or value of $75,000 with respect to each Defendant individually.

15. This Court also has jurisdiction over this action under 28 U.S.C. § 1331 because the underlying dispute involves questions of law and fact arising under the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 *et seq*. ConsumerTrack's claims, as well as XMission's allegations, against each Defendant require interpretation and application of the federal CAN-SPAM Act. Accordingly, a substantial, disputed question of federal law forms an essential element and therefore results in federal subject matter jurisdiction over the claims.

16. Venue is proper in this Court under 28 U.S.C. § 1391 because a substantial part of the events giving rise to the claims occurred within this judicial district and because Defendants directed their allegedly illegal computer access activity to protected computers within this judicial district.

FACTS

17. ConsumerTrack engages in commercial email marketing and, like all email marketers, uses multiple affiliates to distribute emails.

18. Each Defendant is one of ConsumerTrack's affiliates.

19. On November 24, 2014, Defendant Blue C Ads signed an insertion order with terms and conditions with ConsumerTrack in which Blue C Ads agreed to indemnify ConsumerTrack for third-party claims arising from Blue C Ads' alleged failure to comply with various email regulations, including but not limited to the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 *et seq*. Defendant Blue C Ads owes ConsumerTrack both contractual and equitable indemnity obligations for defending against XMission's allegations in the XMission Suit.

20. On August 4, 2016, Defendant Ad Partners signed an insertion order with terms and conditions with ConsumerTrack in which Ad Partners agreed to indemnify ConsumerTrack for third-party claims arising from Ad Partners' alleged failure to comply with various email regulations, including but not limited to the

CAN-SPAM Act of 2003, 15 U.S.C. § 7701 *et seq*. Defendant Ad Partners owes ConsumerTrack both contractual and equitable indemnity obligations for defending against XMission's allegations in the XMission Suit.

21. On November 11, 2014, Defendant Offer Conversion signed an insertion order with terms and conditions with ConsumerTrack in which Offer Conversion agreed to indemnify ConsumerTrack for third-party claims arising from Offer Conversion's alleged failure to comply with various email regulations, including but not limited to the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 *et seq*. Defendant Offer Conversion owes ConsumerTrack both contractual and equitable indemnity obligations for defending against XMission's allegations in the XMission Suit.

22. On November 21, 2012, Defendant Progrexion signed an insertion order with terms and conditions with ConsumerTrack in which Progrexion agreed to indemnify ConsumerTrack for third-party claims arising from Progrexion's alleged failure to comply with various email regulations, including but not limited to the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 *et seq*. Defendant Progrexion owes ConsumerTrack both contractual and equitable indemnity obligations for defending against XMission's allegations in the XMission Suit.

23. On February 16, 2012, Defendant LeadVision signed an insertion order with terms and conditions with ConsumerTrack in which LeadVision agreed to indemnify ConsumerTrack for third-party claims arising from LeadVision's alleged failure to comply with various email regulations, including but not limited to the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 *et seq*. Defendant LeadVision owes ConsumerTrack both contractual and equitable indemnity obligations for defending against XMission's allegations in the XMission Suit.

24. On July 15, 2013, Defendant ZapLabs entered into an ongoing business relationship with ConsumerTrack to send emails as part of email marketing efforts that required ZapLabs to comply with various email regulations and indemnify ConsumerTrack for third-party claims arising from ZapLabs' alleged failure to

comply with various email regulations, including but not limited to the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 *et seq*. Defendant ZapLabs owes ConsumerTrack at least equitable indemnity obligations for defending against XMission's allegations in the XMission Suit.

The XMission Lawsuit

25. On January 20, 2017, XMission, L.C. filed the XMission Suit against ConsumerTrack in the United States District Court, District of Utah for alleged violations of the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 *et seq*. As used herein, the term "XMission Suit" refers to the case XMission filed against ConsumerTrack in the United States District Court, District of Utah, as well as any other actions or proceedings in which ConsumerTrack has to defend against XMission's allegations with respect to emails allegedly sent by ConsumerTrack's affiliates named herein as Defendants.

26. The XMission Suit alleges violations of 15 U.S.C. § 7704(a)(1) for sending emails accompanied by materially false or materially misleading Header Information and 15 U.S.C. § 7704(a)(1)(A) for false names and/or addresses used in the registration of domains used to send the emails.

27. The XMission Suit also alleges violations of 15 U.S.C. § 7704(a)(5) for failure to include a physical address for the sender of the email.

28. XMission seeks statutory damages, treble damages, and attorneys' fees and costs in an amount exceeding $20,000,000.00.

29. The XMission Suit is aimed at emails allegedly sent by ConsumerTrack's affiliates, and as such, ConsumerTrack's affiliates owe indemnification obligations to ConsumerTrack for its fees, costs, and potential damages related to XMission's allegations.

30. ConsumerTrack denies all allegations made by XMission in the XMission Suit.

Defendants' Emails

31. The Defendants are responsible for approximately 31,000 of the approximately 33,000 emails alleged by XMission to violate CAN-SPAM in the XMission Suit.

32. Though ConsumerTrack denies all of XMission's allegations, the allegations, if true, would violate multiple provisions of the agreements and/or indemnity obligations between ConsumerTrack and each Defendant. And if XMission's allegations are true, Defendants would be responsible for the vast majority of emails and damages alleged in the XMission Suit.

33. ConsumerTrack denies the allegations in the XMission Suit, including denying any and all liability and damages, but under the indemnity obligations ConsumerTrack has with each of its affiliates, each Defendant is obligated to indemnify and hold harmless ConsumerTrack in its defense against XMission's allegations including in the XMission Suit.

34. ConsumerTrack notified each Defendant of its individual indemnity responsibilities.

35. Blue C Ads and ZapLabs responded, but refused to indemnify and hold harmless ConsumerTrack with respect to the XMission Suit.

36. Ad Partners, Offer Conversion, Progrexion, and LeadVision did not respond at all, making it necessary for ConsumerTrack to request relief from the Courts in this lawsuit.

FIRST CAUSE OF ACTION
Declaratory Relief against All Defendants

37. Plaintiffs hereby incorporate by reference the foregoing paragraphs as though fully set forth herein.

38. Each Defendant owes indemnity obligations to ConsumerTrack related to the emails alleged by XMission in the XMission Suit, including but not limited to indemnification under the Insertion Orders and equitable indemnification principles.

39. For example, the Insertion Orders require Defendants to indemnify ConsumerTrack for any and all justifiable liability, claims, suits, losses, costs and legal fees caused by, arising out of, or otherwise resulting from any act, whether intentional or negligent, or omission of each Defendant, in the performance and/or failure to perform the obligations and honor the representations and warranties agreed to in the Insertion Order.

40. The XMission Suit, if proven by XMission, alleges a justifiable suit that has resulted and will continue to result in losses, costs, and legal fees. ConsumerTrack denies liability in the XMission Suit, but is still suffering losses, costs, and legal fees in defending against the case.

41. The XMission Suit allegations, if true, were caused by, arose of out, or otherwise resulted from intentional or negligent acts or omissions of each Defendant.

42. Each Defendant's acts or omissions as alleged by XMission relate to the performance or failure to perform its obligations or honor its representations and warranties to ConsumerTrack, including but not limited to representations and warranties as agreed upon in the Insertion Orders.

43. For example, each Defendant's emails, as alleged by XMission, do not contain that Defendant's email address, physical address, and phone number as required by the Insertion Orders.

44. The XMission Suit further alleges that each Defendant's emails violate provisions of the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 *et seq.* in violation of the Insertion Order.

45. Blue C Ads rejected ConsumerTrack's request for indemnity in violation of its obligations under the Insertion Order.

46. ConsumerTrack is entitled to indemnity from each Defendant for all liability, claims, fees, or costs associated with the XMission Suit and XMission's allegations therein and each Defendant has failed to properly indemnify

ConsumerTrack.

SECOND CAUSE OF ACTION
Breach of Contract

47. Plaintiffs hereby incorporate by reference the foregoing paragraphs as though fully set forth herein.

48. The Insertion Orders with each Defendant constitute binding contracts.

49. ConsumerTrack performed all of its obligations under those contracts.

50. Each Defendant materially breached their contracts (1) by failing to indemnify ConsumerTrack against losses, costs and legal fees related to and arising from its actions and the XMission Suit; and (2) if the allegations in the XMission Suit are proven to be true, by failing to abide by the warranties and representations within the Insertion Orders.

51. ConsumerTrack has been damaged by each Defendant's breach of contract in an amount to be proven at trial, but no less than $75,000 per Defendant.

THIRD CAUSE OF ACTION
Equitable Indemnity

52. Plaintiffs hereby incorporate by reference the foregoing paragraphs as though fully set forth herein.

53. ConsumerTrack and ZapLabs entered into and engaged in a business relationship related to email marketing since at least July 2013.

54. Through its actions or negligence, as alleged by XMission, ZapLabs sent or caused to be sent emails that XMission alleges violate the CAN-SPAM Act of 2003 and which contained links to ConsumerTrack websites or properties. For this reason, XMission named ConsumerTrack in the XMission Suit and included ZapLabs' emails.

55. If XMission were to prevail on its claims against ConsumerTrack related to emails sent by ZapLabs, then ZapLabs would be a tortfeasor for claims alleged against ConsumerTrack and ZapLabs would therefore have contributed to

ConsumerTrack's liability to XMission.

56. Similarly, ConsumerTrack and each Defendant entered into and engaged in a business relationship related to email marketing that included equitable indemnification obligations.

57. Through its actions or negligence, as alleged by XMission, each Defendant sent or caused to be sent emails that XMission alleges violate the CAN-SPAM Act of 2003 and which contained links to ConsumerTrack websites or properties. For these reasons, XMission named ConsumerTrack in the XMission Suit and included emails from each Defendant.

58. If XMission were to prevail on its claims against ConsumerTrack related to emails sent by each Defendant, then each Defendant would be a tortfeasor for claims alleged against ConsumerTrack and each Defendant would therefore have contributed to ConsumerTrack's liability to XMission.

59. ConsumerTrack seeks equitable indemnification from each Defendant for its contribution to XMission's alleged claims and damages and costs to defend against XMission's allegations.

60. ConsumerTrack has been damaged by each Defendant's breach of its equitable indemnification obligations in an amount to be proven at trial, but no less than $75,000.

RELIEF REQUESTED

Plaintiff ConsumerTrack, Inc. requests that the Court enter judgment in Plaintiff's favor and against Defendants, jointly and severally, as follows:

1. That the Court enter a Declaratory Judgment that Blue C Ads must indemnify ConsumerTrack for all losses, costs, and legal fees associated with the XMission Suit and XMission's allegations therein.
2. That the Court enter a Declaratory Judgment that Ad Partners must indemnify ConsumerTrack for all losses, costs, and legal fees associated with the XMission Suit and XMission's allegations therein.

3. That the Court enter a Declaratory Judgment that Offer Conversion must indemnify ConsumerTrack for all losses, costs, and legal fees associated with the XMission Suit and XMission's allegations therein.
4. That the Court enter a Declaratory Judgment that Progrexion must indemnify ConsumerTrack for all losses, costs, and legal fees associated with the XMission Suit and XMission's allegations therein.
5. That the Court enter a Declaratory Judgment that LeadVision must indemnify ConsumerTrack for all losses, costs, and legal fees associated with the XMission Suit and XMission's allegations therein.
6. That the Court enter a Declaratory Judgment that ZapLabs must indemnify ConsumerTrack for all losses, costs, and legal fees associated with the XMission Suit and XMission's allegations therein
7. That the Court enter a Declaratory Judgment that Blue C Ads breached its contract with ConsumerTrack.
8. That the Court enter a Declaratory Judgment that Ad Partners breached its contract with ConsumerTrack.
9. That the Court enter a Declaratory Judgment that Offer Conversion breached its contract with ConsumerTrack.
10. That the Court enter a Declaratory Judgment that Progrexion breached its contract with ConsumerTrack.
11. That the Court enter a Declaratory Judgment that LeadVision breached its contract with ConsumerTrack.
12. That the Court enter a Declaratory Judgment that each Defendant, including ZapLabs, owes ConsumerTrack equitable indemnity for contributing to ConsumerTrack's damages, loss, and costs related to the XMission Suit and XMission's allegations therein.
13. That the Court award ConsumerTrack compensatory damages against each Defendant in an amount to be proven at trial but in no event less

than $75,000.

14. That the Court award ConsumerTrack special damages against each Defendant in an amount to be proven at trial.

15. That the Court award ConsumerTrack exemplary damages against each Defendant in an amount to be proven at trial.

16. That the Court award ConsumerTrack its costs and attorneys' fees against each Defendant for the costs of this suit and in defending against the XMission Suit and allegations contained therein.

17. That the Court grant such other and further relief as this Court may deem just and proper.

Dated: April 24, 2017

NEWMAN DU WORS LLP

John Du Wors, State Bar No. 233913
john@newmanlaw.com

Attorneys for Plaintiff
ConsumerTrack, Inc.